Adekunle Johnson Oshodi v Public Prosecutor

Tunde Apatira v Public Prosecutor and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO P05-67 OF 1995 CONSOLIDATED WITH CRIMINAL APPEAL NOS P05-68 OF 1995 AND P05-69 OF 1995
SHAIK DAUD, ABDUL MALEK AHMAD AND DENIS ONG JJCA
17 JUNE 1997

Criminal Law *— Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — Heroin recovered from accused's abdomen — Defence of no knowledge — Whether accused had the necessary knowledge of the presence of foreign bodies containing heroin in his abdomen*

Criminal Law *— Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — Exhibits recovered by per rectum examination, X-rays, and insertion of enema — Whether exhibits admissible — Whether there were reasonable grounds to warrant the examination as carried out to ascertain the facts that could afford such evidence as to the commission of an offence — Dangerous Drugs Act 1952 s 31A(1)*

Criminal Law *— Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in dangerous drugs — Weight of heroin — Whether necessary to prove weight of drugs to be exactly and precisely that weight stated in the charge in cases involving the trafficking of heroin or other related drugs with a similar minimum tariff*

The three appellants had been jointly tried on separate charges of trafficking in dangerous drugs, namely heroin, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the Act. Only the amounts they were trafficking in differed. The customs officers who apprehended them took them to the hospital where they were subjected to a per rectum examination. X-rays were taken of the abdomen and foreign bodies were detected in the abdomens of the three appellants. Enema was then inserted into the rectum of each of the three appellants to induce the discharge of the foreign bodies and three bedpans duly marked were placed on the floor, one each for the appellants. Each of the three appellants discharged foreign bodies into their respective bedpans. All these foreign bodies were sent to the Chemistry Department for analysis. The sausage-like packages containing white powdery substance was analysed to be heroin. The trial judge held that the prosecution had proven all ingredients of the respective charges against each accused, and made out a prima facie case beyond all reasonable doubt which if unrebutted would warrant the conviction of the first, second and third accused. Accordingly, each accused was called to enter his defence. All the three appellants testified that they did not know that the foreign bodies they swallowed contained heroin; that they believed that they had swallowed pellets containing raw gold. The judge found the appellants guilty, convicted and sentenced them to death. The appellants appealed. Several issues were raised by counsel for

A the appellants pointing to the weaknesses in the prosecution's case. They were, inter alia: (i) the drug exhibits were not admissible as they were forcibly taken from the appellants; (ii) allegation of unfair investigation; (iii) samples taken for analysis were not representative of the whole; and (iv) failure to produce the three bedpans.

B **Held**, dismissing the appeal:

(1) Physical custody or control is by itself insufficient for there must be the accompanying evidence of knowledge of the custody or control of the dangerous drug, although it must be said that such knowledge need not amount to full and exact knowledge. At the C same time, knowledge without custody or control will also not be sufficient. To establish possession by an accused person of any dangerous drug or to impute his possession of the said drugs, it must first be shown that he had knowledge of the drugs which were found to be in his possession.

D In the present case, the accused's bodies were the 'things containing' the dangerous drugs; while a living person is certainly not a 'thing containing' within the intention of s 37(d) and for the presumption of knowledge to be invoked against the accused, yet there was more than ample direct evidence that each accused had the necessary knowledge of the presence of the foreign E bodies in the respective abdomens. The accused, with the pellets of drugs in their digestive system, were converted into intelligent thinking and ambulatory containers of dangerous drugs, with each having the exclusive custody and control of the drugs in their bodies. With custody and control, and knowledge of custody F and control, each accused was therefore in possession, as expounded in any judicial pronouncement on its meaning, of the amount of dangerous drugs as they were individually charged (see pp 650D–H and 651C–D); *Leow Nghee Lim v R* [1956] MLJ 28, *PP v Lai Ah Bee* [1974] 2 MLJ 74 and *PP v Badrulsham bin Baharom* [1988] 2 MLJ 585 followed.

G (2) Pursuant to s 31A(1) of the Act, there were reasonable grounds to warrant the examination as carried out to ascertain the facts that could afford such evidence as to the commission of an offence. The per rectum examination, X-rays and insertion of enema were all reasonably necessary in the circumstances, and H the drugs exhibits, recovered with the application of minimum force and secured by means legally provided, were therefore admitted (see p 652E–F).

(3) Based on the evidence, no injustice was detected or found on the complaint of an unfair investigation (see p 653C–D).

I (4) Any perceived or conceivable error to the chemist's conclusions, attributable to the infirmities in the chemist's blending process, accepting for a moment that it was less than perfect, could not possibly have affected his findings to such an extent, as to have

raised a reasonable doubt that the heroin content was less than 15g. In cases involving the trafficking of heroin or other related drugs with a similar minimum tariff, the need to prove the weight of drugs to be exactly and precisely that weight stated in the charge is non-existent, if it can be proven beyond all reasonable doubt that the weight of drug content in the drug exhibits is above 15g. In the instant case, the chemist had testified as a factual witness, and it was accepted by the court that the weights of heroin involved were conclusively not less than 15g in all three cases, and were the weights given by the chemist (see p 653E–H).

(5) The non-production of the pans had not weakened the prosecution's case; the pans were washed and the foreign bodies counted, one pan at a time. The bedpans were not vital — they were merely tools used in the recovery of the foreign bodies (see pp 653I and 654A–C).

(6) The court had dutifully deliberated on the same considerations as the trial judge and there was no reason to interfere with the finding of the trial judge. The appeals were accordingly dismissed and the convictions and sentences confirmed (see p 660G).

[Bahasa Malaysia summary

Ketiga-tiga perayu telah dibicarakan bersama atas pertuduhan berasingan kerana mengedar dadah berbahaya, iaitu heroin, suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') yang boleh dihukum di bawah s 39B(2) Akta tersebut. Cuma jumlah yang diedarkan berbeza. Pegawai-pegawai kastam yang menangkap mereka membawa mereka ke hospital di mana mereka terpaksa melalui pemeriksaan dubur. Gambar X-ray telah diambil atas abdomen dan jasad asing telah dikesan dalam abdomen ketiga-tiga perayu. Enema kemudiannya dimasukkan dalam dubur setiap perayu bagi mencetuskan buangan jasad asing dan tiga penampung najis yang ditandakan telah diletakkan di lantai, setiap satu untuk setiap perayu. Setiap perayu membuang jasad asing dalam penampung najis masing-masing. Kesemua jasad asing ini telah dihantar ke Jabatan Kimia untuk analisa. Bungkusan macam sosej yang mengandungi bahan serbuk putih dianalisakan sebagai heroin. Hakim perbicaraan memutuskan bahawa pihak pendakwa telah membuktikan segala unsur pertuduhan masing-masing terhadap setiap tertuduh, dan membuat kes prima facie melampaui semua keraguan munasabah yang mana sekiranya tidak dipatahkan akan membawa kepada sabitan tertuduh pertama, kedua dan ketiga. Oleh itu, setiap tertuduh dipanggil supaya memasukkan pembelaannya. Kesemua tiga perayu memberi keterangan bahawa mereka tidak tahu bahawa jasad asing yang ditelan mengandungi heroin; bahawa mereka percaya mereka telah menelan until yang mengandungi emas tulen. Hakim mendapati perayu-perayu bersalah, menyabit dan menjatuhkan hukuman mati. Perayu-perayu membuat rayuan. Beberapa isu telah dibangkitkan oleh peguam perayu-perayu yang menonjolkan kelemahan dalam kes

A pihak pendakwa. Mereka adalah, antara lain: (i) ekshibit dadah tidak boleh diterima kerana mereka diambil secara paksaan daripada perayu-perayu; (ii) pengataan tentang siasatan yang tidak adil; (iii) contoh yang diambil untuk analisa tidak mewakili keseluruhan analisa; dan (iv) kegagalan untuk mengemukakan tiga penampung najis itu.

B **Diputuskan**, menolak rayuan:

(1) Jagaan atau kawalan fizikal adalah dengan sendirinya tidak memadai kerana mesti terdapat keterangan yang mengiringi keterangan tentang pengetahuan jagaan atau kawalan dadah berbahaya, meskipun ia mesti dikatakan bahawa pengetahuan C demikian tidak perlu merupakan pengetahuan yang penuh dan tepat. Pada masa yang sama, pengetahuan tanpa jagaan atau kawalan juga tidak memadai. Bagi membuktikan milikan oleh seseorang tertuduh tentang mana-mana dadah berbahaya atau mengatakan pengetahuannya tentang dadah tersebut, ia mestilah D dahulunya ditunjukkan bahawa dia tahu tentang dadah yang dijumpai dalam milikannya.

Dalam kes ini, badan tertuduh adalah 'benda yang mengandungi' dadah berbahaya; manakala seorang yang hidup tentunya bukanlah 'benda yang mengandungi' dalam maksud s 37(d) dan supaya anggapan pengetahuan terpakai terhadap E tertuduh, namun terdapat keterangan langsung yang lebih daripada mencukupi bahawa setiap tertuduh tahu tentang kehadiran jasad asing dalam abdomen masing-masing. Tertuduh, dengan until dadah dalam sistem penghadaman mereka, telah bertukar menjadi bekas dadah berbahaya yang berfikiran cerdik F dan bergerak, setiap satu mempunyai jagaan dan kawalan eksklusif atas dadah dalam tubuh mereka. Dengan jagaan dan kawalan, dan pengetahuan tentang jagaan dan kawalan, mengikut penerangan terperinci dalam mana-mana pengumuman kehakiman atas makna milikan setiap tertuduh dengan itu memiliki jumlah dadah seperti yang dipertuduhkan secara G berasingan (lihat ms 650D–H dan 651C–D); *Leow Nghee Lim v R* [1956] MLJ 28, *PP v Lai Ah Bee* [1974] 2 MLJ 74 dan *PP v Badrulsham bin Baharom* [1988] 2 MLJ 585 diikut.

(2) Menurut s 31A(1) Akta tersebut, terdapat alasan yang munasabah bagi mewajarkan pemeriksaan itu seperti yang dijalankan untuk H memastikan fakta tertentu yang menyokong keterangan tentang sesuatu kesalahan. Pemeriksaan dubur, gambar X-ray dan kemasukan enema adalah amat perlu secara munasabah dalam keadaan, dan ekshibit dadah, yang didapati menerusi penggunaan kekerasan yang amat sedikit dan diperolehi menerusi cara yang I sah, dengan itu diterima (lihat ms 652E–F).

(3) Berdasarkan keterangan, tiada ketidakadilan dikesan atau dijumpai mengenai aduan siasatan yang tidak adil (lihat ms 653C–D).

(4) Sebarang kesilapan yang kelihatan atau boleh dijangka dalam kesimpulan ahli kimia, yang boleh dianggap berpunca daripada

proses pengadunan ahli kimia, pada anggapan seketika bahawa ia adalah kurang sempurna, tidak mungkin mempengaruhi apa yang dijumpainya sampai takat itu, sehingga membangkitkan keraguan yang munasabah bahawa kandungan heroin adalah kurang daripada 15g. Dalam kes yang melibatkan pengedaran heroin atau dadah berkaitan yang lain dengan tarif minima yang serupa, keperluan untuk membuktikan berat dadah adalah benar-benar seperti yang dinyatakan dalam pertuduhan tidak wujud, jika ia boleh dibuktikan melampaui segala keraguan munasabah bahawa berat dalam ekshibit dadah adalah lebih daripada 15g. Dalam kes ini, ahli kimia telah memberi keterangan sebagai saksi faktual, dan ia telah diterima oleh mahkamah secara muktamad bahawa berat heroin yang terlibat adalah tidak kurang daripada 15g dalam ketiga-tiga kes, dan merupakan berat yang diberikan oleh ahli kimia (lihat ms 653E–H).

(5) Penampung-penampung yang tidak dikemukakan tidak melemahkan kes pihak pendakwa; penampung-penampung telah dicuci dan jasad asing telah dikira, satu demi satu. Penampung najis tidak penting — mereka cumalah alat-alat yang digunakan untuk mendapat jasad asing (lihat ms 653I dan 654A–C).

(6) Mahkamah dengan patuhnya telah meneliti pertimbangan yang sama dengan hakim perbicaraan dan mendapati tiada alasan untuk mengganggu keputusan beliau. Rayuan-rayuan dengan itu ditolak dan sabitan dan hukuman-hukuman disahkan (lihat ms 660G).]

Notes

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 117–221.

Cases referred to

Leow Nghee Lim v R [1956] MLJ 28 (folld)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (folld)
PP v Lai Ah Bee [1974] 2 MLJ 74 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 31(A)(1), 39B(1)(a), (2)

Appeal from: Criminial Trial Nos 45–9 of 1995, 45–10 of 1995 and 45–11 of 1995 (High Court, Pulau Pinang)

Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the appellants.

Mohd Yusof bin Hj Zainal Abiden (Deputy Public Prosecutor) for the respondent.

Abdul Malek Ahmad JCA (delivering the judgment of the court): The three appellants, who are Nigerian nationals, had been jointly tried on

A separate charges of trafficking in dangerous drugs, namely heroin on 13 August 1990 at about 12.05am at the Butterworth District Hospital in the district of Seberang Perai in the State of Penang, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the Act. Only the amounts they were trafficking in differed and the said amounts were 117.8gm for the first appellant, 231.7gm B for the second appellant and 262.8gm for the third appellant.

The facts of the case, which are not exactly in dispute, could have come out of a paperback best-seller or a blockbuster movie. The three appellants, with three other Nigerians, had been stopped at the Butterworth railway station on 12 August 1990 at about 12.45pm by customs officers C and their luggage had been searched at the Butterworth customs office. Since nothing was found, all six Nigerians were released and escorted back to the railway station to take the train southbound for Kuala Lumpur.

After the train had left, one of the customs officers (PW6) found an unattended bag on the platform. He searched it immediately and found D pellet-like articles, reeking of stool, in a waist pouch. He immediately informed his superior who immediately instructed the customs officers in Taiping and Ipoh, the next two southbound railway stations, to apprehend the Nigerian group.

When the train arrived at the Ipoh railway station, on 12 August E 1990 at about 5.15pm, the customs officers stationed there boarded the train and escorted all six Nigerians back to the Butterworth customs office. They arrived at about 10pm and were duly handed over to another group of customs officers who took them to the Butterworth District Hospital. There, they were subjected to a per rectum examination where the doctor on duty at the emergency unit inserted his finger into the rectum of the F three appellants and a fourth Nigerian called Oni. The presence of foreign bodies was felt in the rectum of the first and the third appellants. X-rays were taken of the abdomen of all the six Nigerians but foreign bodies were detected only in the ascending, traverse and descending colons of the three appellants but not the other three Nigerians.

G Enema was then inserted into the rectum of each of the three appellants to induce the discharge of the foreign bodies and three bedpans duly marked were placed on the floor, one each for the appellants. Between 1.50am to 4.45am on 13 August 1990, witnessed by the doctor (PW2), medical assistant (PW5) and the investigating officer (PW11), each of the three appellants discharged foreign bodies into their respective bedpans. H All in all, 22, 44 and 50 foreign bodies respectively were found in the first, second and third appellants' bedpans. All these foreign bodies were sent to the Chemistry Department for analysis.

The chemist (PW1) gave evidence that he subjected the white powdery substance found inside the foreign bodies, which he described as sausage- I like packages, to a total of five qualitative and quantitative tests which had the effect of determining the nature and quantity of the drugs.

The sausage-like packages had three layers, an outermost rubbery layer, a masking tape intermediate layer and a plastic sheet innermost layer. The outermost rubbery layer of each package was tied in a knot at

one end and the chemist had cut it open at the unknotted end. The white powdery substance in the innermost layer was analysed to be heroin, a dangerous drug falling under the First Schedule to the Act.

As regards the first appellant, the 22 packages discharged from his body contained 117.8gm of heroin. For the second appellant, the 44 packages which came out from his body amounted to 231.7gm of heroin. As for the third appellant, the 50 packages recovered from his body contained 262.8gm of heroin.

Having seen and heard the prosecution witnesses, in particular the chemist (PW1), the doctor (PW2), the medical assistant (PW5), the customs officer (PW6) and the investigating officer (PW11), the learned trial judge was satisfied that the facts had been proven by the prosecution and in relation to the possibility of any confusion or mix up as to whose body the foreign bodies came out from, he was impressed by the evidence of PW2, in particular, who had meticulously washed, counted and labelled the exhibits recovered from each appellant before they were sent for chemical analysis.

The learned trial judge was fully aware, and he stated so in his well reasoned judgment, that physical custody or control is by itself insufficient for there must be the accompanying evidence of knowledge of the custody or control of the dangerous drug, although it must be said that such knowledge need not amount to full and exact knowledge (see *Leow Nghee Lim v Reg* [1956] MLJ 28). At the same time, knowledge without custody or control will also not be sufficient (see *PP v Lai Ah Bee* [1974] 2 MLJ 74), while in *PP v Badrulhisham bin Baharom* [1988] 2 MLJ 585, it was held that to establish possession by an accused person of any dangerous drug or to impute his possession of the said drugs, it must first be shown that he had knowledge of the drugs which were found to be in his possession.

The learned trial judge had said:

> Based on the total evidence of the chemist, doctor, medical assistant, X-ray room operator and investigating officer, it was unmistakable that each accused had foreign bodies inside their abdomen. That the foreign bodies discharged were the foreign bodies seen on the X-rays, and were the 22, 44 and 50 'sausage-like packages'. The accused's bodies were the 'things containing' the dangerous drugs; while a living person is certainly not a 'thing containing' within the intention of s 37(d) and for the presumption of knowledge to be invoked against the accused, yet there was more than ample direct evidence that each accused had the necessary knowledge of the presence of the foreign bodies in the respective abdomens.
>
> The foreign bodies were discharged through the anus, much as waste would from the digestive system. For the foreign bodies to have gone into the digestive system, the accused must have ingested it by way of the mouth. Indeed, counsel for the second accused, proposed, while examining SP11, the likelihood that the foreign bodies were 'consumed' outside Malaysia.
>
> The taking of food or other things through the mouth is a voluntary and conscious act, and in the present case, the foreign bodies in the abdomen of the accused could not have been accidental. The number of foreign bodies in the abdomen of each accused was just too many and the physical size of

A the foreign bodies just too large for any of them not to have known what they were taking or had taken. The latter was said in the light of the absence of any suggestion or evidence that the foreign bodies were surgically planted against the will or without the knowledge of the accused.

The almost identical purity of heroin in the white powdery substance, the similar appearance and make-up of the foreign bodies, and the absence B of stool in any of the accused's discharge suggestive of their collective abstinence or disdain for food, were all positive indicators of their common design and planning. *Acta exteriora indicant interiora secreta*, and without a doubt whatsoever exposed that guilty knowledge.

The accused, with the pellets of drugs in their digestive system, were converted into intelligent thinking and ambulatory containers of dangerous C drugs, with each having the exclusive custody and control of the drugs in their bodies, and if not waylaid were certainly in a position of taking it to the destination of their choice.

With custody and control, and knowledge of custody and control, each accused was therefore in possession, as expounded in any judicial D pronouncement on its meaning, of the amount of dangerous drugs as they were individually charged.

He was also made aware, in consequence of the submissions made, that there appeared to be other weaknesses in the prosecution's case and he had dealt with them in detail and, for the reasons given by him, had E overruled them. These include having a joint trial for all three appellants when they were facing separate charges as the relevant incriminating exhibits which were similar in appearance could have been easily mixed up, the difference in the appearance of the same exhibits when first recovered and when produced at the trial which the learned trial judge found to be unavoidable as the innards of the sausage-like packages had to F be removed for analysis and when removed, each package lost its pristine and full shape, and the four missing rubber skins in the case of the second appellant which PW2 and PW5 clarified was because the skins were broken.

Objections had also been made by learned counsel for the appellants that the chemist and the investigating officer gave different weights of the G drugs recovered. What really transpired was that the amounts were exactly the same to the last decimal point but the former had given them as the net weight and the latter had given them as the gross weight.

On this, the learned trial judge had this to say:

Having collocated the two sets of weights, it was reasonably deduced that H SP11 had mistakenly given the gross weights from a wrong set of figures. If the set of figures given by SP11 were completely unrecognizable, being entirely different to the weights given by SP1, it would be a matter of investigation and grave concern whether SP1 and SP11 were in fact giving evidence on the very same 'sausage-like packages'. However, the figures given by SP1 as the net weights of the white powdery substance and the I figures given by SP11 as the gross weights of the 'sausage-like packages' were completely identical, a coincidence too incredible for any reasonable belief that they had dealt with different exhibits. The possibility that they had weighed different exhibits and yet reached the same numerical figures for all three accused was considered, but was not accepted as it was too

remote a possibility. Further, what was important was not the gross weight of sausage-like packages, or the net weight of white powdery substances, but the weight of the heroin content and that was conclusively established by SP1. A

There were other points raised during submissions that the learned trial judge had dealt with. The first was that the drug exhibits were not admissible as they were forcibly taken from the appellants. Referring to s 31A(1) of the Act which reads: B

> When any person is arrested on a charge of committing an offence against this Act —
>
> (a) which is of such a nature; or C
>
> (b) which is alleged to have been committed under such circumstances,
>
> as to give reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence against this Act, it shall be lawful for a medical officer acting at the request of any police officer not below the rank of Sergeant, or any officer in charge of a police station, or any officer of customs, and for any person acting in aid of a medical D officer and under his direction, to make such an examination or examinations of the person arrested as may be reasonably necessary in order to ascertain the facts which afford such evidence, and to use or cause to be used such force as may be reasonably necessary for that purpose.

the learned trial judge had said: E

> SP7 was that customs officer who made the request to SP2, the medical officer, to carry out the examination on the accused, and SP5 was the medical assistant acting in aid of the medical officer. There were reasonable grounds for the examination requested, for the discovery of pellets with stool earlier in the day, warranted the examination as carried out to ascertain the facts that could afford such evidence as to the commission of an offence. F The per rectum examination, X-rays and insertion of enema were all reasonably necessary in the circumstances, and the drugs exhibits, recovered with the application of minimum force and secured by means legally provided were therefore admitted.

The next point was that the investigation was unfairly conducted as the investigating officer (PW11) was a witness with an active role in the recovery of the drug exhibits and also there was no first information report. For these objections, the learned trial judge made the following observations: G

> It could not be denied that SP11 had given much more than what is normally given as evidence by investigating officers. After all, he put himself H forward as a witness to the happenings on the night of 12 August 1990 and morning of 13 August 1990. However, the all important labelling and sealing of the three plastic bags with the foreign bodies was carried out by SP5 under the supervision of SP2. He took possession of the three plastic bags and contents only after it was labelled and sealed. The chemist (SP1) found the hospital seals on the three plastic bags intact when he received it, I and after analysis, he resealed the envelopes containing the plastic bags with his chemist seal. The chemist's seals on all the envelopes containing the plastic bags were intact when SP1 opened the envelopes in court. Therefore, SP11 had not tampered with the three plastic bags and its contents from the

A moment it was handed to him at the Hospital Daerah until it was produced in court. What other role SP11 played was his shuffling from customs office to chemist to store keeper and to the court with the sealed envelopes. Therefore, aside from witnessing the events of recovery on the morning in question, SP11 was more a delivery clerk than a true investigation officer, a designation which was more nominal euphemistic than real.

B On 17 August 1990, SP11 also lodged separate police reports against each accused. However, those reports lodged post facto the event of 13 August 1990, were not tendered and surely must have been intended as covering reports for the ongoing 'investigations' with SP11 technically as the complainant. Those reports were also not fundamental to the evidence of the arresting officers (not SP11) (*PP v Abdul Razak bin Johari* [1991] C 1 MLJ 105) as the prosecution's case depended not on the evidence of the arresting officers from Ipoh, but the evidence at the Hospital Daerah Butterworth.

As such, no injustice or prejudice was detected or found on this complaint of an unfair investigation.

D The third point was that the samples taken for analysis were not representative of the whole. The comment of the learned trial judge was as follows:

> The chemist said he blended the white substance with a domestic blender and was satisfied that, by so blending, the white substance was homogenized E and the samples taken for analysis were representative of the whole. Perhaps, at some point of time in future, a better blending method would be used; however, for the present, any perceived or conceivable error to the chemist's conclusions, attributable to the infirmities in the chemist's blending process, accepting for a moment that it was less than perfect, could not possibly have affected his findings to such an extent, as to have raised a reasonable doubt F that the heroin content was less than 15g. Certainly, in drug-related offences, the weight of drug content is an important and commanding issue; but that importance is only whether the weight is more or less than the tariffs specified for lesser or higher offences. In cases involving the trafficking of heroin or other related drugs with a similar minimum tariff, the need to prove the weight of drugs to be exactly and precisely that weight stated in G the charge is non-existent, if it can be proven beyond all reasonable doubt that the weight of drug content in the drug exhibits is above 15g.
>
> In borderline cases, a marginal error in the quantitative computation may be crucial, and the benefit of any doubt must be given to an accused. However, in the instant case, the chemist had testified as a factual witness, and it was accepted by the court that the weights of heroin involved were H conclusively not less than 15g in all three cases, and were the weights given by the chemist.

The last point was the failure to produce the three bedpans. The finding of the learned trial judge on this point was:

> The bedpans were the immediate receptacles of the foreign bodies when it I emerged. Said to have been numbered, the production of the pans would have afforded the opportunity for an inspection of the numbers written on the pans. However the non-production of the pans had not weakened the prosecution's case; the pans were washed and the foreign bodies counted, one pan at a time. Since it was washed and counted one pan at a time, what

was momentous and crucial was not the numbering of the pans, which would only be an additional precaution, but that the particulars written on the masking tapes and affixed to the plastic bags were indeed the particulars of the particular accused in front of SP2, SP5 and SP11 when the foreign bodies were removed from the pan and counted. Indeed, that was what the witnesses said had transpired. That being so, even a failure to number the pans would not have mattered. The bedpans, numbered or unnumbered, was also not vital — it was merely a tool used in the recovery of the foreign bodies, much as a crowbar would be a tool to prise open the floor boards of a house suspected of hoarding incriminating articles. The pans were never that indispensable bits needed to complete the proof of the offence, as much as the mucus washed away did not dent the overall case against the accused.

Accordingly, at the end of the prosecution's case, the conclusion of the learned trial judge was:

> Consequently, on the maximum evaluation standard laid down in the landmark case of *Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265, the prosecution had proven all ingredients of the respective charges against each accused, and made out a prima facie case beyond all reasonable doubt which if unrebutted would warrant the conviction of the first, second and third accused; accordingly, each accused was called to enter his defence.

All the three appellants elected to give evidence under oath. The second appellant testified first. Basically, he admitted the facts adduced by the prosecution but said that he did not know that the foreign bodies he swallowed in Bangkok contained heroin. If he had known, he would not have swallowed them. He had swallowed the pellets on behalf of one Bisi, his girlfriend in the belief that he was swallowing pellets containing raw gold. He, however, denied that the foreign bodies were counted, and the plastic bag containing them sealed, in his presence. The first and the third appellants gave similar evidence.

The sum total of the testimony of the three appellants was that they had left Lagos by plane on 16 July 1990 and had arrived in Bangkok on 18 July 1990 at about 2pm. The second appellant stayed at the Grace Hotel in Bangkok with Bisi who had brought along with her raw gold pellets, similar to the AA size of battery cells, by swallowing them in Nigeria. Bisi had intended to sell them to a Bangkok goldsmith to get foreign currency to shop for her boutique. Unfortunately, the goldsmith had a surplus and although he did not buy the raw gold, Bisi left it with him.

The second appellant and Bisi had entered Malaysia on 21 July 1990 with one Fatimo where they stayed at the Grand Continental Hotel in Kuala Lumpur. After doing some shopping, they ran out of money and returned to Thailand on 27 July 1990. After getting money there, they came to Malaysia the second time on 6 August 1990. On this visit, Bisi got word that her mother was seriously ill in Nigeria. Bisi left for Lagos on 7 August 1990 via Bangkok. The second appellant left Kuala Lumpur on 8 August 1990 and arrived in Bangkok the following day.

Bisi had called him to say that her sister Stola would be coming to take her luggage left behind in Kuala Lumpur. She also told him that

A Fatimo's husband, Wole, had secured another goldsmith willing to buy the raw gold. On 10 August 1990 at about 6pm, Wole told the second appellant that he had taken possession of Bisi's gold and as agreed between them, Wole had disguised the gold. On 11 August 1990 at 10am in Wole's hotel room, the second appellant saw 20 gold pieces undisguised lying on
B the table. There were also pellets, similar to the ones subsequently found in his body, in a plastic bag.

The second appellant added that he saw the first appellant, third appellant and Fatimo swallowing the pellets. Wole had told him that from the raw gold he got from the Bangkok goldsmith, 80 of the 100 pieces had been wrapped to be swallowed while the remaining 20 were the pieces he
C saw on the table. The second appellant swallowed some of the pellets but could not remember how many, and promptly departed for the Bangkok railway station on 11 August 1990 at about 1pm. It was on this journey, his third visit to Malaysia, that he was arrested and charged.

The first appellant gave evidence that he worked for Imperial
D Statement Store in Lagos which dealt with motor repairs, clothing and gold. Wole was the owner of the gold section and since he dropped out of school, Wole had taken good care of him.

As a result, he would do anything for Wole.

In June 1990, he was told by his manager Dehide that Wole, who was
E in Bangkok, had telephoned to ask the first appellant to go there to buy motor spare parts. Before he left on 16 July 1990, together with the first and third appellants, Dehide gave him some gold and told him to swallow it which he did. All in all, he swallowed 50 pellets similar to the ones discharged from his body after his arrest. In Bangkok, the three appellants
F were met by Wole and Bisi before proceeding to the Grace Hotel. At the hotel, Wole gave him something to chew following which the 50 gold pellets came out whereupon he cleaned them, cut the wrappers and removed the gold, which Wole took to a goldsmith.

On 19 July 1990, he went to Malaysia by train with Wole and the third appellant. They only went by rail to Bukit Mertajam after which they
G took a taxi to Kuala Lumpur where they stayed at the Grand Continental Hotel. The purpose of the visit was to check for spare parts but Wole came along as he was familiar with Kuala Lumpur. After spending two weeks in Kuala Lumpur, they shipped two box loads of things to Lagos. The first appellant returned to the Grace Hotel in Bangkok but Wole and the third
H appellant stayed behind in Kuala Lumpur.

On 13 August 1990 morning, he was in his hotel room with the third appellant when Wole asked them to go to his room which they did and found Wole and Fatimo there. The second appellant came later. He saw on Wole's table gold similar to the one he brought from Lagos and in a plastic bag he saw pellets similar to the ones he had swallowed earlier.
I Wole told him that there was no market for the gold in Bangkok and he was to take it to Kuala Lumpur. At that time, Fatimo was swallowing the pellets and so he did the same taking a minute or so to swallow each pellet but could not remember how many he swallowed. The reward, he said, was some of the spare parts they had shipped home to Nigeria.

On the fateful train journey to Kuala Lumpur, he said the six Nigerians sat in separate cars until they reached Haadyai. He admitted that he discharged the pellets at the Butterworth District Hospital after enema was injected into him but could not remember the number discharged. He denied, however, that the pellets were counted, and the plastic bag sealed, in his presence.

The third appellant testified that he too worked at the Imperial Statement Store and it was Dehide who asked him to take the phone call from Wole in Bangkok. Wole had told him to collect some money from Dehide and travel to Bangkok. From Dehide, he took US$1,800 and 60 pieces of wrapped raw gold which he swallowed before leaving for Bangkok with the first and second appellants.

At the Grace Hotel in Bangkok, after meeting Wole and Bisi, the former gave him laxatives causing him to purge out the pellets from inside his body which he cleaned after which he cut the wrappings and removed the gold which Wole collected. He had then gone to Kuala Lumpur on 19 July 1990 with Wole and the first appellant. He spent two weeks shopping with Wole before returning to Bangkok.

On 10 August 1990, Wole told him that he had collected the gold from the Bangkok goldsmith and he wanted him and the first appellant to go to Kuala Lumpur. On the next day, he and the first appellant with whom he shared the room, went to Wole's room at 10am. He saw 20 gold pieces on the table and pellets in a plastic bag similar to the ones he had swallowed. Some were being swallowed by Fatimo. Wole told him and the first appellant to do the same which they did. The second appellant came later and did the same thing. The third appellant could not remember how many he swallowed but it took him three hours after which, with the other two appellants and Fatimo, took the train to Kuala Lumpur.

After his arrest, he said it was PW5 who tested him, did the per rectum examination and inserted enema and not PW2. He admitted discharging the pellets but could not remember how many as they were all taken away. He denied they were counted, and the plastic bag sealed, in his presence and that the bedpans were marked.

The learned trial judge went on to say:

> Further to the above, all three accused commonly testified that consistent with their innocence:
>
> (i) they did not resist their arrest nor did they attempt to escape or break their journey to avoid the customs officers.
>
> (ii) they refused to sign the chemist's report when a copy was served on them sometime in April 1991, as the report declared the substances found in the pellets as heroin while they understood it to contain gold.
>
> (iii) there was failure by the arresting officers to show them the contents of at least one of the pellets, and that failure was consistent with their belief that the pellets they had discharged contained gold and not heroin.
>
> (iv) they swallowed pellets with gold to evade taxation.

Apart from the above, the three accused offered no further evidence. Quite obviously, the defence of each accused was substantially made up of out-of-court statements of persons who were not witnesses, a point the prosecution was incensed, although serious objection for hearsay was raised only during submissions at the close of the defence.

He had dealt with the law on hearsay evidence with which we have no quarrel about and therefore we need not elaborate on that point. He then continued:

> Now wittingly or unwittingly, all three accused descended on the same bedrock, that they were duped into swallowing pellets that they thought were pellets containing raw gold. The mental state and conduct thereafter the makings of statements of each of the accused were therefore very much an issue. If that was so, then the out-of-court statements, central to the defence, could not be peremptorily ruled out but were admitted not so much that the contents of those statements were accepted testimonially, but that such statement were made so as to gauge the mental state of each accused at the time they swallowed the pellets. For the same reason, ID34 was also rejected as the defence said it was intended to produce it to prove the contents of the statements ID34.
>
> At the close of the defence, counsel in their submissions repeated one after the other, as if with one voice that the evidence of each accused was a reasonable explanation and they should be acquitted.
>
> The cardinal principle enshrined in our criminal law is that the onus of proving the guilt of an accused is throughout on the prosecution and there is no burden upon the accused to prove anything. If upon the whole evidence, the court is left in a real state of doubt, arising from the prosecution's case or defence, the prosecution would have failed to satisfy the burden of proof upon it.
>
> However, with the maximum evaluation of the prosecution's evidence at the close of the prosecution's case before calling for the defence, it was axiomatic that having called for the defence, the court was satisfied that there was no doubt whatsoever in the prosecution's case.
>
> In the present case, that doubt sufficiently to dislodge the prosecution must therefore arise from the defence. The accused therefore had the evidentiary burden of raising a doubt to any of the primary facts relied upon by the prosecution, and even the only applicable statutory presumption under s 37(da) of drug trafficking was itself dependent of primary facts. Failing to raise a doubt to the primary facts, each accused was to rebut the presumption of trafficking on a balance of probabilities (see *Yuvaraj v PP* [1969] 2 MLJ 217), with proof that it was more probable he was respectively not trafficking in dangerous drugs. Then, if on the totality of the prosecution's case and the defence, the court is left with any doubt or reservation as to the guilt or innocence, then following time honoured practice in criminal trials, the accused would be acquitted.

As to the defence story of the gold, the learned trial judge said:

> If that is so, then there were too many questions on the accused's evidence of gold smuggling to evade tax:
>
> (i) why was the gold not sold and converted to cash and the cash taken to Thailand?

(ii) why should gold be smuggled into Thailand in such a hazardous fashion, via the stomach with extreme danger to health and perhaps even life, and for what little ostensible gain, to save on the import duty? A

when the import duty could be saved if the gold was converted into currency before entry into Thailand, a much easier convenient and legal mode, than the risk of danger to human life, the confiscation of the gold and prosecution to follow if discovered. B

And why must easily convertible gold be sold only in Bangkok, and the special allure in Bangkok that must be smuggled and converted in Bangkok but not elsewhere?

The accused spoke of an attempt to convert that gold in Kuala Lumpur, but only because the gold smuggled with such hardship to Bangkok, most curiously could not be sold in Bangkok but only in Kuala Lumpur. To say that gold could not be sold in Bangkok is to say the least most dubious and unconvincing — if the gold could not be sold in Thailand, why was it smuggled into Thailand and only Thailand initially. Why was there such an intricate and elaborate plan said just to evade tax? C

Accepting as being true that that particular goldsmith in Bangkok was not prepared to buy the gold, it was not unreasonable to presuppose that there must have been some other goldsmith or indeed scores of goldsmiths in Bangkok ready to take the gold. Perhaps the alternate price securable could be slightly lower, but the loss suffered by any change of a buyer could never be to the extent to have warranted the gold smuggling to Malaysia and the perils as described by the accused. D E

That tale of gold smuggling became even more improbable, in the light of the accused's evidence of: (i) 100 pieces of gold in Bisi's stomach, 50 pieces in the first accused's stomach, and 60 pieces in the third accused's stomach; (ii) on a long trip two days from Lagos to Bangkok, and in the case of the third accused, he had 60 pieces of gold in his stomach for three days from 15 July 1990 to 18 July 1990; and (iii) that each, with all that metal in their bodies must be 'weighing a ton', like super sleuths evaded all detection by all security personnel and devices at both the Lagos and Cairo Airports. F

The entire story of gold smuggling from Nigeria to Bangkok was just too improbable and too far fetched to have any truth.

As for Wole, Bisi and Dehide, the learned trial judge remarked: G

Also central to the defence were the above 'persons'. However, none testified in court to ratify the accused's evidence. Although the third accused said he wrote to his family to contact Wole to 'clear things up', nothing else was said by any of the accused of the attempts to secure their testimony and the reasons for the absence of Wole and Bisi. H

He also commented on the lack of evidence from the relevant hotel staff, airport authorities, shipping agent and spare parts dealer.

On the question of a frame up, the learned trial judge said:

All three accused said Fatimo was swallowing pellets at about the same time they were swallowing similar pellets. Since Fatimo was said to have swallowed pellets, then surely she too must discharge foreign bodies at the Hospital on 13 August 1990. However, the X-ray on Fatimo disclosed no such foreign bodies and none were discharged by her. As such, the three accused's evidence that Fatimo was swallowing pellets were entirely against the weight I

A of undoubted evidence and just could not be true, and so was their evidence that they were told to follow the example of Fatimo. A further pertinent point was, if Wole was indeed setting up the accused, why should he have permitted his own wife Fatimo to swallow the very same kind of pellets swallowed by persons he was setting up, and why should he have consented to his own wife being in the company of persons he was setting up in that B journey to Kuala Lumpur, when he fully well knew that his wife might well be caught, as indeed Fatimo was arrested along with the three accused, and was incarcerated until February 1992. That Wole would sacrifice his wife just to set up the accused simply could not be rationalized.

As to the conduct of the defence, he stated:

C All three accused admitted that they discharged foreign bodies. 'They were duped', they all bemoaned. If that was so, then the pellets undoubtedly contained heroin only that they had no such knowledge. That being the defence, then consistent with innocence, there should not have been any attack on the prosecution's evidence. Yet they called liars the doctor and his medical assistant, who were after all just carrying out medical duties as D instructed without interest in the outcome of the arrest, unlike possibly the customs officers. Indeed, the recovery sealing and labelling of the foreign bodies by independent medical officers, but not the customs officers, lent considerable weight and assurance that the versions of the events at the hospital were as that related by the prosecution. To allege mendacity was E not only consistent with a defence of the absence of mens rea, but also against the weight of the evidence.

The learned trial judge went on to say:

Besides the above, there were also too many unexplained and questionable gaps in the defence story:

F (a) The first and third accused said they were employees of Wole. However, there was no association between Wole and Bisi. How then did Bisi and the second accused got to know and met up with Wole to the extent of entrusting him with 100 pieces of gold in a strange and foreign country?

(b) The first accused said they (Wole and him) took all the things they bought back to the Hotel Grand Continental Hotel. How did they take G all those 'things', engines blocs, pistons, pistons rings, crank shafts, worth about US$25,000 back to the hotel, when it was two large boxes requiring shipment to Nigeria? What was the special reason the first accused was sent all the way from Nigeria to Kuala Lumpur to select common engine parts?

H (c) Why gold was transferred to Bangkok by way of the stomach as the mode of transfer of funds, when a bank counter would have been able to fulfil that purpose?

(d) What was the special significance of shopping in Bangkok and Kuala Lumpur, to the extent that short of money the second accused and Bisi returned to Bangkok to get money to continue their (shopping) for I such common items as clothing, shoes and unisex apparel in Kuala Lumpur?

(e) Was their lengthy absence from Nigeria, and correspondingly long stay in Bangkok and Kuala Lumpur simply to buy rather innocuous items, but pulled off only by an elaborate scheme to smuggle gold to Bangkok?

(f) Were the accused that gullible idiotic and zombie-like swallowing everything that was said to them, while in court each was at times wily and at other times evasive with words? A

(g) Were the purposes of travel as given?

Further questions could be asked but that would just be adding to a litany of irrational behaviour, and dubious explanation. The defence put pithily was a 'because I say so'. Well, the form of defence was the accused's prerogative, but they were not truthful. In the end, the defence was not believed, because it was not believable, being contrary to all good sense and common knowledge of normal human conduct and thinking. Seen in totality, the defence was manufactured, and even then poorly manufactured. B

There was further one fatal flaw in the defence, that most undoubtedly and conclusively proved the three accused's knowledge of the contents of the pellets that were brought into Malaysia. The first and third accused both said they discharged pellets at the Grace Hotel, Bangkok on 18 July 1990, cleaned the pellets and took out the gold. The second accused said he helped Bisi to wrap the raw gold in Nigeria. They all said the raw gold was of the size of a battery cell, the forefinger or fourth finger. The gold on the table in Wole's room was similar to the gold they brought to Bangkok and similar to the gold they (that) were swallowed in Bangkok. C D

In rendering that evidence, they failed to realize that they had admitted both touching and feeling the weight of the gold pieces in their hands. The first accused felt 60, the second whatever number he was helping of Bisi's 100 pieces, and the third accused 60 pieces, and in any event sufficient handling of the gold pieces for an appreciation of the weight and load of the gold in their hands. However, the density of gold and heroin powder are vastly different, such that with their experience of handling similar pieces of gold, they could not have failed to appreciate the vast weight difference when they held the pellets in their hands, before they ingested it. The weight of the pellets they were swallowing ought to have alerted them that the pellets they were swallowing were just too light to be containing gold. That undoubted(ly) spoke for their knowledge that the pellets they were swallowing were not pellets containing gold, but a substance much lighter, heroin. E F

On these considerations, the three appellants were found guilty, convicted and sentenced to death. We had dutifully deliberated on the same considerations and we can find no reason to interfere with the finding of the learned trial judge. The appeals are accordingly dismissed and the convictions and sentences confirmed. G

Appeals dismissed. H

Reported by Jafisah Jaafar

I